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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF:

SMOKEY MOUNTAIN SMELTERS
SUPERFUND SITE,
Knox County, Tennessee,

DANA JOHNSON,
Respondent

U.S. EPA Region 4

Docket No. CERCLA-04-2009-3761

Proceeding Under Section 104(e) of the
Comprehensive Environmental Response,
Compensation, and Liability Act, as
amended, 42 U.S.C. § 9604(e)

**ADMINISTRATIVE ORDER DIRECTING COMPLIANCE
WITH REQUEST FOR ACCESS**

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I. JURISDICTION

1. This Administrative Order ("Order") is issued to Dana Johnson (hereinafter, "Respondent"), pursuant to the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9604(e)(5), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.400(d)(4). This authority was delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923, redelegated to the Regional Administrators of EPA on May 11, 1994, by EPA Delegation No. 14-6. EPA Region 4 Regional



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I. JURISDICTION

1. This Administrative Order ("Order") is issued to Dana Johnson (hereinafter, "Respondent"), pursuant to the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9604(e)(5), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.400(d)(4). This authority was delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923, redelegated to the Regional Administrators of EPA on May 11, 1994, by EPA Delegation No. 14-6. EPA Region 4 Regional

Delegation 14-6 further delegates this authority to the Chief of the Emergency Response and Removal Branch.

II. STATEMENT OF PURPOSE

2. This Order requires Respondent to grant EPA and its authorized representatives entry and access to the real property described in Paragraph 3 below ("the Site") located in Knox County, Tennessee, for the purposes of implementing a removal action and otherwise enforcing the provisions of CERCLA. This Order further requires Respondent to refrain from interfering with access to the Property by EPA and its authorized representatives for the purposes set forth herein.

III. FINDINGS OF FACT

3. At the time of his death in 1998, Daniel E. Johnson owned the real property at 1508 Maryville Pike in Knox County, Tennessee (the "Site"). The Site property encompasses approximately 13 acres and includes one large industrial process building, several smaller outlying buildings, a spring-fed lagoon, and a large waste pile.

4. Respondent is an heir to the Estate of Daniel E. Johnson, which includes the Site property located at 1508 Maryville Pike, Knox County, Tennessee.

5. The Site was originally operated as a fertilizer factory beginning in the 1920's. The Site was purchased by Daniel E. Johnson in 1979, and thereupon began operating as Smokey Mountain Smelters Inc. ("SMS"), also known as Rotary Furnace, Inc. SMS operated the Site as a secondary aluminum smelting and casting operation. The process involved the melting of scrap aluminum and aluminum dross (a waste by-product of primary and secondary aluminum smelting) to remove impurities. The smelted aluminum was then cast into ingots.

6. Investigations at the Site have revealed the presence of arsenic, lead, and ammonia at concentrations that exceed the Removal Action Levels or other human health or environmentally based standards.

7. To address the release or threatened release of a hazardous substance or pollutant or contaminant at the Site, EPA has determined that it is necessary to conduct certain time-critical response actions thereon. These activities will include securing the Site to reduce direct exposure pathways to nearby human populations, and evaluating and conducting further steps to mitigate potential off-Site migration of hazardous substances, pollutants, and contaminants.

8. To perform the response actions described above, it will be necessary for the employees, agents, contractors, and other representatives of EPA to enter the Site property. The activities for which entry is required include:

- a. Sampling of any solids, liquids, or gases stored, spilled, released, or disposed of on the Site;

- b. Sampling of un-containerized materials and containerized materials stored in drums and tanks on-site to characterize wastes;
- c. Sampling soil, water, and air as may be determined necessary;
- d. Drilling of holes and investigating surface or subsurface contamination;
- e. Stabilizing reactive, leaking or weakened containers;
- f. Stabilizing or treating unstable materials;
- g. Over packing, labeling and staging of containers prior to their removal from the Site;
- h. Crushing of empty drums for off-site disposal and dismantling and decontamination of tanks;
- i. Removing from the property containerized materials for proper disposition off-site;
- j. Restricting access to the Site by construction of temporary fencing, barriers, locks and or security;
- k. Performing surveying activities for the purposes of determining sampling locations;
- l. Installing temporary power supply if needed;
- m. Staging equipment and supplies on the Site while sampling or removal activities are ongoing;
- n. Inspecting and copying of all documents related to the operations and the generation, treatment, storage, disposal, or source of hazardous substances at the Site;
- o. Taking photographs of the property and the surrounding areas;
- p. Demolishing buildings and other structures which impede reasonably safe access to the hazardous substances; and,
- q. Recycling materials recovered from the site.

9. Despite repeated requests from representatives of EPA, Respondent has refused to provide access for purposes of performing the response actions described above. These requests include:

- a. A verbal request during a telephone conversation on August 27, 2008, from Teresa Mann, EPA Region 4 Attorney, to Mary LeAnn Mynatt, Respondent's attorney, (*Attachment 1*); and,
- b. A letter, dated October 21, 2008, again made by Teresa Mann to Respondent's attorney.

To date, Respondent has failed to respond to EPA's access requests.

10. EPA requires immediate access to the Respondent's Property to conduct the time-critical response actions described herein.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

11. The Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

12. All of the substances in Paragraph 6 above are hazardous substances, pollutants, or contaminants within the meanings of Sections 101(14) and 101(23) of CERCLA, 42 U.S.C. §§ 9601(14), 9601(23).

13. The past disposal and migration of a hazardous substance or pollutant or contaminant at the Site constitutes an actual "release" or a threat of such a release into the "environment" within the meanings of Section 101(8) and 101(22) of CERCLA, 42 U.S.C. §§ 9601(8) and (22), and thus there is a reasonable basis to believe that there may be a release or threat of release within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 104(e)(1).

14. Respondent is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

15. Pursuant to Tenn. Code Ann. § 31-2-100 *et seq.* (Intestate Succession), the ownership of the Site passed to Daniel E. Johnson's heirs as tenants in common at the time of his death. Daniel E. Johnson was survived by three heirs at law: Respondent, his daughter; Diane Johnson, his spouse; and Brandon Johnson, his son.

16. Respondent is a tenant in common owner of the Site property, a facility:

- a. where a hazardous substance or pollutant or contaminant has been generated, stored, treated, disposed of, or transported from;
- b. from or to which a hazardous substance or pollutant or contaminant has been released; and
- c. where entry is needed to effectuate inspection, sampling, and a response action within the meaning of Section 104(e) of CERCLA, 42 U.S.C. § 9604(e)(3).

17. Entry to property owned or controlled by Respondent by EPA and its officers, employees, agents, contractors, and other representatives of the United States is needed for the purposes of taking a response action pursuant to the provisions of CERCLA, within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1).

18. EPA's request for access to the Property has not been granted.

V. ORDER

19. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record, Respondent is hereby ordered to provide EPA and its officers, employees, agents, contractors, and other representatives, full and unrestricted access at all reasonable times to the Site property for the purpose of conducting response actions, including, but not limited to, conducting a time-critical removal action. Such access shall continue until such time as the removal action has been completed, but not to exceed November 30, 2009.

20. Respondent shall not interfere with EPA's exercise of its access authorities pursuant to 42 U.S.C. § 9604(e) and 40 C.F.R. § 300.400(d), and shall not interfere with or otherwise limit any activity conducted at the Site property pursuant to this Order by EPA, its officers, employees, agents, contractors, or other representatives. Any such interference shall be deemed a violation of this Order.

21. Nothing herein limits or otherwise affects any rights of entry held by the United States pursuant to applicable laws, regulations, or permits.

22. This Order shall apply and be binding upon Respondent and her successors, heirs and assigns, and each and every agent of Respondent, and upon all other persons and entities who are under the direct or indirect control of Respondent, including any and all lessees of Respondent.

23. In the event of any conveyance by Respondent, or Respondent's agents, heirs, successors and assigns, of an interest in the Property, Respondent or Respondent's agents, heirs, successors and assigns shall convey the interest in a manner which insures continued access to the Property by EPA and its representatives for the purpose of carrying out response actions pursuant to this Order. Any such conveyance shall restrict the use of the Site property so that the use will not interfere with activities undertaken or to be undertaken by EPA and its representatives. Respondent, or Respondent's agents, heirs, successors and assigns shall notify EPA in writing at least thirty (30) days prior to the conveyance of any interest in the Property, and shall, prior to the transfer, notify the other parties involved in the conveyance of the provisions of this Order.

VI. ENFORCEMENT

24. Compliance with this Order shall be enforceable pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5). A court may impose a civil penalty on Respondent of up to \$32,500 for each day that Respondent unreasonably fails to comply with this Order, as provided in Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), and the Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 40 C.F.R. Part 19.4. Nothing herein shall preclude EPA from any additional enforcement actions, or other actions it may deem necessary for any purpose, including the prevention or abatement of a threat to the public health, welfare, or the environment arising from conditions at the Site, and recovery of the public costs thereof.

25. Nothing in this Order constitutes a waiver, bar, release, or satisfaction of or a defense to any cause of action which EPA has now or may have in the future against Respondent, or against any entity which is not a party to this Order.

26. Nothing in the Order shall affect in any manner the right of EPA to issue any other orders to or take any other administrative or civil action against Respondent or any other parties under CERCLA which relate to the Site, the Site property, or any other site.

27. Nothing in this Order constitutes a decision on preauthorization of funds under Section 111(a)(2) or CERCLA, 42 U.S.C. § 9611(a)(2).

VII. ADMINISTRATIVE RECORD

28. EPA has established an Administrative Record which contains the documents that form the basis for the issuance of this Order. It is available for review by appointment on weekdays between the hours of 9:00 a.m. and 4:00 p.m. at the EPA offices in Atlanta, Georgia. To review the Administrative Record, please make an appointment with Debbie Jourdan, who may be reached at (404) 562-8862.

VIII. OPPORTUNITY TO CONFER

29. Within two (2) business days after receipt of this Order by Respondent, Respondent may request a conference with EPA, to be held no later than two (2) business days after Respondent's request, on any matter pertinent to this Order, including its applicability, the factual findings and determinations upon which it is based, the appropriateness of any actions Respondent is ordered to take, or any other relevant and material issues or contentions which Respondent may have regarding this Order. Respondent may appear in person or by an attorney or other representative at the conference. Respondent may also submit written comments or statements of position on any matter pertinent to this Order no later than the time of this conference, or at least one (1) business day before the effective date of this order if Respondent does not request a conference. EPA will deem Respondent to have waived its right to the conference or to submit written comments if she fails to request the conference or submit comments within the specified time period(s). Any request for a conference or written comments or statements should be submitted to:

Adam Dilts, Assistant Region Counsel
Office of Environmental Accountability
United States Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
Telephone: (404) 562-9676

IX. EFFECTIVE DATE; COMPUTING OF TIME

30. This Order shall be effective four (4) business days after its receipt by Respondent or Respondent's designated representative unless a conference is timely requested as provided above. If a conference is timely requested, then at the conclusion of the conference or after the conference, if EPA determines that no modification to the Order is necessary, the Order shall become effective immediately upon notification by EPA of such determination. If modification of the Order is determined by EPA to be necessary, the Order shall become effective upon notification by EPA of such modification. Any EPA notification under this paragraph may, at EPA's discretion, be provided to Respondent by facsimile, electronic mail, or oral communication, provided that if EPA does use such a form of notification, it will also confirm such notification by first class, certified or express mail to Respondent or its legal counsel. Any amendment or modification of this Order by EPA shall be made or confirmed in writing.

31. For purposes of this Order, the term "day" shall mean a calendar day unless expressly stated to be a business day. "Business day" shall mean a day other than a Saturday, Sunday, or federal legal holiday. When computing any period of time under this Order, if the last would fall on a Saturday, Sunday, or federal legal holiday, the period shall run until the next business day.

X. NOTICE OF INTENT TO COMPLY

32. On or before the effective date of this Order, Respondent shall notify EPA writing whether Respondent will comply with the terms of this Order. A document suitable for this purpose is attached hereto (*Attachment 2*). Respondent's failure to notify EPA of its unconditional intent to fully comply with this Order by the time the Order becomes effective shall be: (a) construed as a denial of EPA's request for access; and (b) as of the effective date of the Order, treated as a violation of the Order. Such written notice shall be sent to:

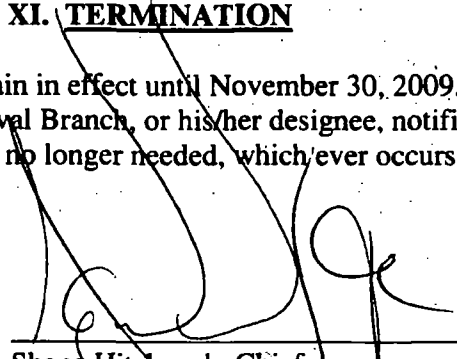
Adam Dilts, Assistant Region Counsel
Office of Environmental Accountability
United States Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
Telephone: (404) 562-9676

XI. TERMINATION

33. This Order shall remain in effect until November 30, 2009, or until the Chief of the Emergency Response and Removal Branch, or his/her designee, notifies Respondent in writing that access to the Property is no longer needed, whichever occurs first.

SO ORDERED.

Date: 11/20/2008


for **Shane Hitchcock, Chief**
Emergency Response and Removal Branch
Superfund Division
Region 4
United States Environmental Protection Agency